THE EFFECT OF WAIVER OF TORT ON LATER ACTIONS. — The doctrine of waiver of tort, that the true owner may sometimes sue a mere converter in indebitatus assumpsit on a fictitious promise to pay, is firmly entrenched in our law, but its limits have never been clearly defined.[1] Perhaps a majority of American jurisdictions carry it to its logical conclusion and allow assumpsit for goods sold and delivered,[2] although there has been no subsequent sale by the tortfeasor upon which to ground the early fiction of a promise in an action for money had and received.[3] Since the whole doctrine arose on considerations of convenience alone, it may be fairly carried to its full length.[3]

Whatever the limits of this doctrine, it is often necessary to consider the effect of the judgment in such a suit in passing title to the chattel converted. In a late English case the court refused recovery in detinue against a vendee of the converter, because judgment apparently in indebitatus assumpsit had been obtained after the sale against the converter himself.[4] *Bradley & Cohn, Ltd.*, v. *Ramsay & Co.*, 106 L. T. R. 771 (Eng., C. A., June, 1912). If the former action had been trover, it is clear that the purchaser would not be protected by the judgment against his vendor.[5] Even in the case of joint tortfeasors where the remedy is joint and several a judgment in trover against one is no bar to an action against another.[6] The difference in the form of the prior action should make no difference in the result, for the substantial right is the same in either action. It is elemental that there has been no real sale. The distinction in the principal case seems a step backward toward the antiquated emphasis on form, raising "a fiction to defeat a remedy." When the true owner has brought a previous suit in assumpsit, or has accepted a part of the proceeds of the sale from the converting vendor, the courts sometimes talk of ratification of the sale,[7] but it is impossible to ratify an act which did not purport to be done in one's behalf.[8] Furthermore, there seems no injustice in the plaintiff's demanding the proceeds of the sale, and, failing to get them, demanding at least the fair value of the

expense. As a street railroad is an additional servitude on the highway in New York, such legislation might properly be held unconstitutional in that state. *Cf.* People *v.* Adams, 88 Hun 122, 34 N. Y. Supp. 579, aff'd in 147 N. Y. 722, 42 N. E. 725.

[1] See 6 HARV. L. REV. 223.

[2] Moore *v.* Richardson, 68 N. J. L. 305, 53 Atl. 1032; Shober & Carqueville Lithographing Co. *v.* Schedler, 63 Ill. App. 48; Crown Cycle Co. *v.* Brown, 39 Or. 285, 64 Pac. 451.

[3] Moses *v.* Macferlan, 2 Burr. 1005; Lightly *v.* Clouston, 1 Taunt. 112. See POLLOCK, TORTS, 9 ed., 554.

[4] In the prior suit the action was nominally in detinue, but the court thought its pleadings framed on the theory of assumpsit. The evidence was clear that there was no prior contract, so we must either view the judgment by consent as a contract in itself, although it is difficult to work out the defendant's assent, or treat the action as indebitatus assumpsit and let the judgment by consent account for the recovery of £750 for chattels worth but £400.

[5] Miller *v.* Hyde, 161 Mass. 472, 37 N. E. 760; Singer Mfg. Co. *v.* Skillman, 52 N. J. L. 263.

[6] Lovejoy *v.* Murray, 3 Wall. (U. S.) 1. In England the right against joint tortfeasors is joint alone, and judgment against one bars a second action. Brinsmead *v.* Harrison, L. R. 6 C. P. 584.

[7] Leavitt *v.* Fairbanks, 92 Me. 521.

[8] Mitchell *v.* Minnesota Fire Association, 48 Minn. 278, 51 N. W. 608; Collins *v.* Suaw, 7 Rob. (N. Y.) 623.

chattel from the subsequent converter. It is submitted that a second action should be allowed unless the present defendant can show that it is inequitable.[9]

The case of suits in indebitatus assumpsit and trover against the same defendant must be distinguished. Here judgment in one clearly and justly merges that cause of action.[10] But in general the arguments above given apply with equal force to the case of a judgment in indebitatus assumpsit while the original tortfeasor is still in possession of the property, followed by an action of replevin before satisfaction.[11] Here it is more difficult to decide whether replevin is allowed even after an action of trover. The cases allowing replevin,[12] however, where the chattel at the time of the prior judgment was in the hands of a third party, do not rely on this fact, and it seems to afford no basis for a distinction.[13] In fact there are well-considered *dicta*[14] and at least two decisions that an unsatisfied judgment does not bar replevin.[15] The contrary doctrine places far too much emphasis on the questionable vexation of a delinquent defendant, and far too little on the right of the injured plaintiff to his property or its value. It is, in effect, forcing on a plaintiff a sale of his property on credit to a debtor of doubtful solvency, when he has asked for compensation for the loss of that property.

ENFORCEMENT BY ONE STATE OF PENAL STATUTES OF ANOTHER. — The rule that penal statutes of one state will not be enforced in another is well settled, but what statutes are included under this head is a question which has divided the courts. The Supreme Court of the United States[1] and the Privy Council of England[2] limit the term "penal" to those statutes forbidding and punishing acts against the state. In most state courts the definition covers any statute the purpose of which is to prevent forbidden acts by inflicting penalties and punishment.[3] The ques-

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[9] See Huffman *v.* Hughlett, 11 Lea (Tenn.) 549. *Contra*, Terry *v.* Munger, 121 N. Y. 161.

[10] State Bank of Council Grove *v.* Rude, 23 Kan. 143.

[11] The same point is presented by an action of trover, indebitatus assumpsit, or replevin against one who purchases after a judgment in indebitatus assumpsit against the original tortfeasor in possession. If title passed on the prior judgment the later action would not lie.

[12] See cases cited in note 5, *supra*.

[13] But see 16 HARV. L. REV. 131; 3 HARV. L. REV. 326. The view that judgment in trover against a tortfeasor in possession passes title probably developed from the early doctrine that possession of chattels gives title. See 3 HARV. L. REV. 23, 24.

[14] See Hepburn *v.* Sewell, 5 Harr. & J. (Md.) 211, 212; Drake *v.* Mitchell, 3 East, 251, 258.

[15] Ledbetter *v.* Embree, 12 Ind. App. 617, 40 N. E. 928; Goff *v.* Craven, 34 Hun (N. Y.) 150. *Contra*, Rogers *v.* Moore, Rice (S. C.) 60; Foreman *v.* Neilson, 2 Rich. Eq. (S. C.) 287.

[1] See Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. 224. This point in the Supreme Court decision is *dictum*, since the case only decided that a judgment on such a statute must be given full faith and credit under the constitution. See MINOR, CONFLICT OF LAWS, § 10, n. 3.

[2] See Huntington *v.* Attrill, [1893] A. C. 150.

[3] Derrickson *v.* Smith, 27 N. J. L. 166; Halsey *v.* McLean, 94 Mass. 438; Bird *v.* Hayden, 1 Rob. (N. Y.) 383; Cary *v.* Schmeltz, 141 Mo. App. 570, 125 S. W. 532.